STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED July 30, 2013
v	No. 303236 Berrien Circuit Court
LOREN TROUEZE ROBINSON, Defendant-Appellant.	LC No. 2010-001540-FH

Before: SAWYER, P.J., and METER and DONOFRIO, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of extortion, MCL 750.213; delivery of a controlled substance less than 50 grams, second offense, MCL 333.7401(2)(a)(iv); MCL 333.7413(2); unlawful imprisonment, MCL 750.349b; and aggravated assault, MCL 750.81a(1). The trial court sentenced defendant as an habitual offender, second offense, MCL 769.10, to concurrent prison terms of 150 to 360 months for the extortion conviction, 38 to 480 months for the delivery of a controlled substance conviction, 120 to 270 months for the false imprisonment conviction, and 365 days for the aggravated assault conviction. Defendant appeals as of right. We affirm defendant's convictions and sentences, but remand for correction of the order to remit prisoner funds.

I. SUFFICIENCY OF THE EVIDENCE

Defendant argues that his convictions were not supported by sufficient evidence. We review de novo challenges to the sufficiency of the evidence. *People v Cline*, 276 Mich App 634, 642; 741 NW2d 563 (2007). We view the evidence in a light most favorable to the prosecution and determine whether a rational trier of fact could have found that the prosecution proved the elements of the crime beyond a reasonable doubt. *Id.*

Most of defendant's argument is an attempt to reargue the credibility of the witnesses. Defendant claims that the victim, Joshua Karamalegos, was not a credible witness for numerous reasons, including that he lied to the police. Defendant also claims that Victor Sawyer, a codefendant, was not credible because Sawyer received a plea agreement and that his own testimony, because it was supported by the testimony of two witnesses, was credible. The credibility of the witnesses was a question for the jury, *People v Harrison*, 283 Mich App 374, 378; 768 NW2d 98 (2009), and we will not interfere with the jury's role in determining the

credibility of the witnesses, *People v Williams*, 268 Mich App 416, 419; 707 NW2d 624 (2005). Accordingly, we reject defendant's attempts to reargue witness credibility.

Defendant claims that his convictions for extortion and unlawful imprisonment were not supported by sufficient evidence because there was no threat of harm against Joshua if he did not pay the $1,000, his drug debt, to defendant. The crime of extortion requires the malicious communication of a threat, made with the intent to extort money or to obtain a pecuniary advantage, to injure a person or a person's property. MCL 750.213; *People v Fobb*, 145 Mich App 786, 790; 378 NW2d 600 (1985). The elements of unlawful imprisonment, as relevant to the present case, include the restraint of a person to facilitate the commission of another offense. *People v Railer*, 288 Mich App 213, 217; 792 NW2d 776 (2010). Joshua testified that, after he became persistent that he could not get the money unless he went back to Niles, Vincent Wiggins, codefendant, hit Joshua in the head and that, at some time, defendant told Joshua that he was not leaving until he paid the money. Then, as instructed, during one of the telephone calls with his father, Themelis (Tim) Karamalegos, Joshua told Tim that Tim would not see him again if he did not get the money. Defendant did not release Joshua until Tim exchanged the money. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that a malicious threat was made to injure Joshua if $1,000 was not paid to defendant. *Cline*, 276 Mich App at 642.

Defendant also claims that his conviction for aggravated assault was not supported by sufficient evidence because there was no proof of a serious injury. The elements of aggravated assault include the infliction of serious or aggravated injury. MCL 750.81a(1). "A serious or aggravated injury is a physical injury that requires immediate medical treatment or that causes disfigurement, impairment of health, or impairment of a part of the body." CJI2d 17.6(4). Joshua testified that he blacked out each time Wiggins hit him. Joshua also testified that, when he learned he was being arrested after cocaine was found in his pants pocket, he refused a ride in an ambulance to the hospital and asked to be taken to jail. The jail nurse stated that Joshua had to go to the emergency room. The emergency room doctor testified that Joshua suffered a mild concussion and sustained multiple abrasions and contusions to his face. Viewing this evidence in the light most favorable to the prosecution, a rational trier of fact could have found beyond a reasonable doubt that Joshua suffered a serious or aggravated injury. *Cline*, 276 Mich App at 642.

II. NOTICE OF ALIBI

Defendant argues that the trial court erred when it denied his request to file a notice of alibi on the second day of trial. We review a trial court's decision whether to permit a defendant to introduce alibi evidence when the defendant failed to comply with the notice-of-alibi statute, MCL 768.20(1), for an abuse of discretion. *People v Travis*, 443 Mich 668, 679-680; 505 NW2d 563 (1993). A trial court abuses its discretion when its decision falls outside the range of reasonable and principled outcomes. *People v Unger*, 278 Mich App 210, 217; 749 NW2d 272 (2008).

A defendant, if he wants to present an alibi defense, is required to file notice of the alibi at least ten days before trial. MCL 768.20(1). Defendant did not request to file a notice of alibi until the second day of trial. We conclude that the trial court did not abuse its discretion in

denying defendant's request to file a late notice of alibi. *Travis*, 443 Mich at 679-680. The late notice resulted in prejudice to the prosecutor. The prosecutor did not have time to have the alibi witnesses interviewed or investigated or to find rebuttal alibi witnesses. The trial court accepted defense counsel's assertion that he did not learn of a potential alibi defense until January 20, 2011, when he reviewed defendant's January 13, 2011, letter. Defense counsel had represented defendant since the preliminary examination in September 2010, and no reason was provided for defendant's late disclosure of the alibi witnesses. Further, defense counsel deemed it unwise to present an alibi defense. Not only was he concerned about the subornation of perjury, but he also did not believe that an alibi defense was a good strategic approach. Under these circumstances, the trial court's decision to deny defendant's request to file a late notice of alibi fell within the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.[1]

Defendant focuses his argument on defense counsel's statement to the trial court that presenting the alibi witnesses raised an ethical dilemma regarding the subornation of perjury. According to defendant, defense counsel's statement was improper because counsel essentially told the trial court that he did not believe defendant. However, because defendant presents no legal authority in support of the claim that defense counsel made an improper statement, the argument is abandoned. See *People v Kelly*, 231 Mich App 627, 640-641; 588 NW2d 480 (1998). Regardless, the argument does not address whether the trial court, after hearing from defense counsel, defendant, and the prosecutor, abused its discretion in denying defendant's request to file a late notice of alibi.

III. NEW TRIAL/INEFFECTIVE ASSISTANCE OF COUNSEL

Defendant argues that the trial court erred in denying his motion for a new trial based on ineffective assistance of counsel. We review a trial court's decision on a motion for a new trial for an abuse of discretion. *People v Kevorkian*, 248 Mich App 373, 410; 639 NW2d 291 (2001). However, the determination whether a defendant was denied the effective assistance of counsel is a mixed question of fact and constitutional law. *People v Seals*, 285 Mich App 1, 17; 776 NW2d 314 (2009). A trial court must first find the facts and then decide whether those facts constitute a violation of the defendant's right to effective assistance. *People v LeBlanc*, 465 Mich 575, 579; 640 NW2d 246 (2002). We review a trial court's findings of fact for clear error, but review de novo questions of constitutional law. *Id.*

[1] We agree with defendant that he has a constitutional right to present a defense. See *People v Hayes*, 421 Mich 271, 279; 364 NW2d 635 (1984). However, "[t]he accused must still comply with 'established rules of procedure and evidence designed to assure both fairness and reliability in the ascertainment of guilt and innocence.'" *Id.*, quoting *Chambers v Mississippi*, 410 US 284, 302; 93 S Ct 1038; 35 L Ed 2d 297 (1973). MCL 768.20, which is "not intended as a disparagement of the [alibi] defense" but "to erect safeguards against its wrongful use and give the prosecution time and information to investigate the merits of such defense" *People v Merritt*, 396 Mich 67, 77; 238 NW2d 31 (1976) (quotations omitted), is designed to assure fairness and reliability in the verdict.

"Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise." *People v Noble*, 238 Mich App 647, 661-662; 608 NW2d 123 (1999). To establish a claim for ineffective assistance of counsel, a defendant must show that counsel's performance fell below objective standards of reasonableness and that, but for counsel's deficient performance, there is a reasonable probability that the result of the proceedings would have been different. *People v Uphaus (On Remand)*, 278 Mich App 174, 185; 748 NW2d 899 (2008).

First, defendant claims that defense counsel was ineffective for not investigating his alibi defense, filing a notice of alibi, and calling the alibi witnesses at trial. Defendant relies on his and his mother's testimony at the *Ginther*[2] hearing that counsel was told of the alibi witnesses before January 2011. However, the trial court did not believe defendant and his mother. Rather, it found defense counsel, and his version of defendant's assertion of the alibi defense, credible. It found that no alibi witness ever told defense counsel that defendant was with him or her on March 6 or 7, 2010, and that the alibi defense was not established until less than a week before trial. We must defer to the credibility determinations of the trial court, which had a superior opportunity to judge the credibility of the witnesses. MCR 2.613(C); *People v Sexton (After Remand)*, 461 Mich 746, 752; 609 NW2d 822 (2000). Defendant makes no argument that the trial court, after having found defense counsel credible, still erred in determining that counsel was not ineffective for failing to develop an alibi defense. Accordingly, defendant's claim that defense counsel was ineffective for failing to investigate and present an alibi defense is without merit. Defendant has not shown that his counsel's performance fell below an objective standard of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Second, defendant claims that defense counsel was ineffective for failing to investigate the criminal backgrounds of Marcus Hughes and Sawyer. According to defendant, Hughes and Sawyer could have been impeached with prior criminal convictions. However, not all convictions may be used to impeach a witness. Only convictions for crimes that contain an element of dishonesty or false statement or contain, in part, an element of theft may be used to impeach a witness. MRE 609(a). Defendant presented no evidence at the *Ginther* hearing that either Hughes or Sawyer had a conviction that could have been used to impeach him. Accordingly, defendant has not established the factual predicate of the claim. *People v Hoag*, 460 Mich 1, 6; 594 NW2d 57 (1999).

Third, defendant claims that defense counsel was ineffective for failing to impeach Joshua with statements that he made to the police. However, defendant has not identified any statements in police reports that defense counsel failed to use to impeach Joshua. Accordingly, defendant has not shown that defense counsel's cross-examination of Joshua fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Fourth, defendant claims that defense counsel was ineffective for failing to alert the trial court to his learning disability and other problems at sentencing. However, through the presentencing investigation report (PSIR) and from defense counsel's statements, the trial court

[2] *People v Ginther*, 390 Mich 436; 212 NW2d 922 (1973).

learned that defendant has a learning disability and a very difficult time reading and writing and that, when he was in high school, defendant attended special education classes. Defendant does not identify any additional statements defense counsel should have made. Accordingly, defendant has not shown that defense counsel's performance at sentencing fell below objective standards of reasonableness. *Id.*

Fifth, defendant argues that defense counsel was ineffective for failing to obtain telephone records for the telephone number that called Tim's telephone. At trial, Detective Wesley Smigielski testified that the telephone number belonged to a "Boost phone" and, because there was no contract for the telephone, there were no records for it. Because no records existed for the telephone number, defense counsel's performance in failing to obtain the records did not fall below objective standards of reasonableness. *Id.*

Sixth, defendant argues that defense counsel was ineffective for failing to obtain surveillance video from Wal-Mart. However, defendant did not present any evidence at the *Ginther* hearing to suggest that surveillance video from March 7, 2010, was still in existence at the time he was arrested, which was five months after the criminal offenses occurred. Defendant, therefore, has not established the factual predicate of his claim. *Hoag*, 460 Mich at 6.

The trial court did not abuse its discretion in denying defendant's motion for a new trial. *Kevorkian*, 248 Mich App at 410. The ineffective assistance of counsel claims that defendant raised in the motion are without merit.

IV. OFFENSE VARIABLES

Defendant argues that, in scoring the sentencing guidelines for his convictions for extortion, delivery of a controlled substance less than 50 grams, and unlawful imprisonment, the trial court erred in scoring offense variables (OVs) 3, 7, 8, 9, 10, 14, 15, and 16. The interpretation and application of the sentencing guidelines involve legal questions that we review do novo. *People v Huston*, 489 Mich 451, 457; 802 NW2d 261 (2011). However, a trial court has discretion to determine the number of points to be scored, *People v Hornsby*, 251 Mich App 462, 468; 650 NW2d 700 (2002), and we will uphold a scoring decision for which there is any evidence in support, *People v Elliott*, 215 Mich App 259, 260; 544 NW2d 748 (1996). The evidence includes the trial testimony and the contents of the PSIR. *People v Althoff*, 280 Mich App 524, 541; 760 NW2d 764 (2008). We review de novo issues of constitutional law. *People v Billings*, 283 Mich App 538, 541; 770 NW2d 893 (2009).

Defendant claims that the trial court improperly scored the offense variables because the facts used to support the scoring of them were not found beyond a reasonable doubt by the jury, contrary to the holding of *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). However, our Supreme Court has definitively held that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140, 164; 715 NW2d 778 (2006). We are required to follow the decisions of the Supreme Court. *People v Strickland*, 293 Mich App 393, 402; 810 NW2d 660 (2011). Accordingly, defendant's argument is without merit.

Defendant also argues that, even under a preponderance of the evidence standard, see *People v Osantowski*, 481 Mich 103, 111; 748 NW2d 799 (2008), the trial court erred in scoring the offense variables. Sentencing information reports (SIRs) were completed and used by the trial court for sentencing defendant on his convictions for extortion, delivery of a controlled substance less than 50 grams, and unlawful imprisonment. Defendant argues that the trial court erred in scoring the sentencing guidelines for each of the three offenses. However, the trial court was not required to score the guidelines for the unlawful imprisonment conviction. A consecutive sentence was not authorized for the conviction, see MCL 771.14(2)(e)(*i*) and unlawful imprisonment is of a lesser crime class than extortion, see MCL 771.14(2)(e)(*ii*); *People v Chris Mack*, 265 Mich App 122, 126-130; 695 NW2d 342 (2005).[3] We begin with analyzing whether the trial court erred in scoring any of the offense variables, OVs 3, 7, 8, 9, 10, and 14, for the extortion conviction.

"Offense variable 3 is physical injury to a victim." MCL 777.33(1). Ten points are to be scored if "[b]odily injury requiring medical treatment occurred to a victim." MCL 777.33(1)(d). Defendant does not dispute that Joshua suffered bodily injury requiring medical treatment. Rather, he claims that OV 3 was improperly scored because, as directed by the Supreme Court in *People v McGraw*, 484 Mich 120; 771 NW2d 655 (2009), each offense is to be scored separately and because the assault against Joshua was contained in the conviction for aggravated assault and "the extortion was complete after the statement and threat was issued to" Joshua.

In *McGraw*, 484 Mich at 129, 133, our Supreme Court held that the offense variables are to be scored by reference only to the sentencing offense. Conduct occurring outside the sentencing offense may only be considered in scoring an offense variable when the variable specifically so provides. *Id.* at 129. Nothing in *McGraw* stands for the proposition that, where a defendant is convicted of multiple offenses, an offense variable cannot be scored for one offense because the facts used to score the variable were the basis for one of the other convictions. Accordingly, we find no merit to defendant's argument that OV 3 cannot be scored because the actions that resulted in Joshua's bodily injury were the basis for defendant's aggravated assault conviction. The record does not support defendant's assertion that the assault occurred after all threats were made. Joshua testified that no telephone calls were made to Tim until after he was hit by Wiggins. Then, in a telephone call to Tim, Joshua relayed the threat that, unless Tim got the $1,000, Tim would not see him again.

We cannot conclude that the assault was not part and parcel of the extortion offense. At the Lavette Street house, defendant became persistent about getting his money for the cocaine, and Joshua was insistent that he be allowed to go to Niles to get the money. But, Joshua was not allowed to leave the back room of the house. His cellular telephone, wallet, and glasses were taken from him. When Joshua became too persistent on leaving, Wiggins beat him. Thereafter, because defendant had told Joshua that he was not leaving until defendant was paid, Joshua called Tim for the money. He communicated the threat that Tim would not see him again if Tim

[3] Extortion is a class B crime. MCL 777.16*l*. Unlawful imprisonment is a class C crime, MCL 777.16q.

did not get the money. Under these facts, the assault on Joshua, which caused him bodily injury requiring medical treatment, was part of defendant's attempt to extort the money owed him. We affirm the trial court's scoring of OV 3. *Elliott*, 215 Mich App at 260.[4]

"Offense variable 7 is aggravated physical abuse." MCL 777.37(1). Fifty points are to be scored if "[a] victim was treated with sadism, torture, or excessive brutality, or conduct designed to substantially increase the fear and anxiety a victim suffered during the offense." MCL 777.37(1)(a). Conduct "designed to substantially increase the fear and anxiety a victim suffered during the offense" is conduct that is "designed to cause copious or plentiful amounts of additional fear." *People v Glenn*, 295 Mich App 529, 533-534; 814 NW2d 686 (2012). Such conduct must be "similarly egregious" as to acts of sadism, torture, and excessive brutality. *Id.* at 534. While in the back room of the Lavette Street house, when Joshua became insistent on leaving, he was hit in the head several times by Wiggins, who had put on gloves. Joshua blacked out each time he was hit and he suffered a concussion. After Joshua stated that, because of a previous head injury, a hard blow to the head could cause him to have a seizure and die, Wiggins showed complete indifference. He asked Joshua if it looked like he cared. Joshua, after Tim agreed to get the $1,000, was taken to an abandoned house, where no one, other than defendant, Wiggins, and Sawyer, knew of his location. At the abandoned house, according to the PSIR, defendant was forced to take off his pants and shoes. This evidence supports the trial court's finding that Joshua was treated with conduct designed to substantially increase his fear and anxiety. We affirm the trial court's score of 50 points for OV 7. *Elliott*, 215 Mich App at 260.[5]

"Offense variable 8 is victim asportation or captivity." MCL 777.38(1). Fifteen points are to be scored if "[a] victim was asported to another place of greater danger or to a situation of greater danger or was held captive beyond the time necessary to commit the offense." MCL 777.38(1)(a). Here, Joshua was taken from the Lavette Street house, where Hughes had last seen him and where Stevie Viel, a resident of the house, had told everyone to leave after he heard Joshua say that he could have a seizure, and brought to an abandoned house owned by defendant's father. No one other than defendant, Wiggins, and Sawyer knew that Joshua was there. Accordingly, as found by the trial court, Joshua was placed in a situation of greater danger. We affirm the trial court's score of 15 points for OV 8. *Elliott*, 215 Mich App at 260.[6]

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[4] We reject defendant's argument that the "rule of lenity" requires a score of zero for OV 3 or any other offense variable. "The 'rule of lenity' provides that courts should mitigate punishment when the punishment in a criminal statute is unclear." *People v Denio*, 454 Mich 691, 699; 564 NW2d 13 (1997). It only applies when the statute's language is ambiguous or in the absence of any firm indication of legislative intent. *Id.* at 700 n 12. Defendant makes no argument that the language of OV 3 or any other offense variable is ambiguous.

[5] We find no merit to defendant's claim, based on *McGraw*, 484 Mich 120, that OV 7 should be scored at zero points because "the force was used at a different time than when the other crimes were committed." This conduct was part of defendant's attempt to extort the $1,000.

[6] We reject defendant's claim that OV 8 should be scored at zero points because "the crimes are to be scored separately." Defendant makes no argument why the movement of Joshua from the

"Offense variable 9 is number of victims." MCL 777.39(1). Ten points are to be scored if "[t]here were 2 to 9 victims who were placed in danger of physical injury or death." MCL 777.39(1)(c). A victim is any person who was placed in danger of physical injury or loss of life. MCL 777.39(2)(b). A person, to be a victim, need not suffer actual harm; close proximity to a physically threatening situation may suffice. *People v Gratsch*, 299 Mich App 604, 624; ___ NW2d ___ (2013). Defendant does not dispute that Joshua was a victim, but claims that there was no other victim. However, the record evidence supports the trial court's finding that Tim was also a victim. Tim agreed to give $1,000 to the people who had threatened Joshua's life and who had actually beaten Joshua. Then, by following their instructions to come to and meet them in Benton Harbor to make the exchange, Tim was placed in danger of physical injury. We affirm the trial court's score of ten points for OV 9. *Elliott*, 215 Mich App at 260.

"Offense variable ten is exploitation of a vulnerable victim." MCL 777.40(1). Points may not be scored unless it was readily apparent that the victim was vulnerable and the victim's vulnerability was exploited. *People v Cannon*, 481 Mich 152, 158-159; 749 NW2d 257 (2008). Five points are to be scored if "[t]he offender exploited a victim by his or her difference in size or strength, or both, or exploited a victim who was intoxicated, under the influence of drugs, asleep, or unconscious." MCL 777.40(1)(c). The term "exploit" means "to manipulate a victim for selfish or unethical purposes." MCL 777.40(3)(b).

According to the PSIR, Joshua told Hughes, while the two men were in jail, that Tim owned several automobile shops and was rich. Hughes testified that he hooked Joshua up with defendant after Joshua said that he wanted some cocaine. Joshua smoked the cocaine he bought from defendant and got high. Hughes testified that he told Joshua to slow down the speed at which he was smoking cocaine. According to Hughes, Joshua was taking his abuse of the cocaine "to another level." After Joshua ran out of cocaine, defendant "fronted" him with more. Hughes thought it was odd that defendant kept giving Joshua, who was not from Benton Harbor, more cocaine without getting any money from him. These facts support the trial court's scoring of OV 10. Joshua's vulnerability, being under the influence of drugs, MCL 777.40(1)(c), would have been readily apparent to defendant. Defendant exploited this vulnerability for his own selfish purposes, MCL 777.40(3)(b), by continuing to give Joshua more cocaine, thereby increasing Joshua's debt to him, when Joshua was unable to recognize how much cocaine he was actually using and how deeply in debt he became. We affirm the trial court's score of five points for OV 10. *Elliott*, 215 Mich App at 260.

"Offense variable 14 is the offender's role." MCL 777.44(1). Ten points are to be scored if "[t]he offender was a leader in a multiple offender situation." MCL 777.44(1)(a). A leader is one who is a guiding or directing head of a group. *People v Jones*, 299 Mich App 284, 287; 829 NW2d 350 (2013) (quotation omitted). The record evidence supports the trial court's finding that defendant was a leader. Defendant gave cocaine to Joshua. When he wanted to be paid for the cocaine, defendant bought food items at a gas station to confirm that Joshua had money on his debit card, picked out a television at Wal-Mart for Joshua to buy for him, and called Joshua's

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Lavette Street house to the abandoned house, which happened after Tim agreed to pay the $1,000 and defendant needed time to decide where to make the exchange, should not be considered part of the extortion offense.

bank. Although Wiggins was the person who hit Joshua, Joshua testified that defendant was in charge and he was just letting his friends do the "dirty work." Defendant told Joshua that he would not be leaving until defendant got his money, and defendant used his cellular telephone to call Tim. Joshua was taken to an abandoned house owned by defendant's father. There, defendant decided that the exchange would occur at the apartment complex. At the apartment complex, defendant instructed Wiggins to give Joshua some of the cocaine that he had previously given Wiggins. Accordingly, we affirm the trial court's scoring of ten points for OV 14. *Elliott*, 215 Mich App at 260.

Because the trial court did not abuse its discretion in scoring any of the offense variables for defendant's conviction for extortion, we affirm defendant's sentences for extortion and unlawful imprisonment. We also affirm defendant's sentence for delivery of a controlled substance less than 50 grams without even determining whether the trial court erred in scoring the relevant offense variables, OVs 3, 9, 14, 15, and 16, for this specific conviction. See *Eller v Metro Indus Contracting, Inc*, 261 Mich App 569, 571; 683 NW2d 242 (2004) (stating that an issue is moot and should not be reached if a court cannot fashion a remedy). Defendant's minimum sentence for delivery of a controlled substance is 38 months, which is far shorter than defendant's minimum sentence of 150 months for extortion. Even if we were to vacate defendant's sentence for delivery of a controlled substance and remand for resentencing, defendant would not be granted any practical relief. Regardless whether defendant's sentence is 38 months or any shorter length, defendant is required, based on his sentence for extortion, to serve a minimum of 150 months' imprisonment.

V. DEFENDANT'S STANDARD 4 BRIEF

Initially, we note that defendant, in his pro per brief, relies extensively on an affidavit that he filed with this Court when he moved for a remand. However, in analyzing defendant's claims, we will not consider the affidavit. Our review is limited to the lower court record. *People v Warren*, 228 Mich App 336, 356; 578 NW2d 692 (1998), rev'd in part on other grounds 462 Mich 415 (2000). The lower court record does not include the affidavit. See 7.210(A)(1).

In his pro per brief, defendant argues that he was denied due process of law because he was not arraigned on the charges in the information and he did not waive arraignment. Because this claim of error was not raised before the trial court, it is unpreserved for appellate review. *People v Metamora Water Serv, Inc*, 276 Mich App 376, 382; 741 NW2d 61 (2007). We review unpreserved claims of error for plain error affecting the defendant's substantial rights. *People v Carines*, 460 Mich 750, 763; 597 NW2d 130 (1999).

The purpose of an arraignment is to provide the defendant with formal notice of the charges against him. *People v Waclawski*, 286 Mich App 634, 706; 780 NW2d 321 (2009). At arraignment on the information, the "court must either state to the defendant the substance of the charge contained in the information or require the information to be read to the defendant." MCR 6.113(B). However, a defendant may not be entitled to be arraigned on the information. MCR 6.113(E) provides that "[a] circuit court may submit to the State Court Administrator pursuant to MCR 8.112(B) a local administrative order that eliminates arraignment for a defendant represented by an attorney, provided other arrangements are made to give the defendant a copy of the information." In December 2007, the Berrien Circuit Court issued

Administrative Order 2007-05, which states that "[i]n all cases where the defendant is represented by an attorney, the Court need not conduct an arraignment on the information." Accordingly, because defendant was represented by an attorney, his right to be arraigned on the information was eliminated. There was no plain error. *Carines*, 460 Mich at 763.

In addition, defendant's claim that he never received notice of the charges against him before trial commenced is contradicted by the lower court record. Defendant was arraigned on the complaint and warrant and had a preliminary examination. At the conclusion of the preliminary examination, after it bound defendant over for trial, the court stated, "I have a not guilty plea entered without formal arraignment; that is entered at this time, along with a jury demand." Defendant, on the day of the preliminary examination, signed a document captioned "Defendant's entry of plea of not guilty without arraignment (M.C.R. 6.113)." By signing the document, defendant agreed, in part, that he received and read a copy of the complaint, warrant, or information; understood the substance of the charges against him; waived arraignment in open court; pleaded not guilty; and demanded a jury trial. Defendant knew of the charges against him before trial commenced.

Next, defendant argues that the trial court erred in denying his request for substitute counsel. "The decision regarding substitution of counsel is within the sound discretion of the trial court and will not be upset on appeal absent a showing of an abuse of that discretion." *People v Jesse Mack*, 190 Mich App 7, 14; 475 NW2d 830 (1991).

Defendant claims that he requested substitute counsel after he and defense counsel disagreed about trial strategy. He wanted to pursue an alibi defense, but defense counsel refused to investigate and pursue the defense. However, in his November 2010 letter to the trial court, defendant did not indicate that he wanted a new attorney because he and defense counsel disagreed about an alibi defense. Rather, defendant told the trial court that he did not feel comfortable with defense counsel as his attorney because he smelled alcohol on defense counsel's breath and because he had not heard from defense counsel after he told defense counsel that he had new evidence and new witnesses, whom he had not previously been able to contact because they had been out of town, and had requested that counsel file a "motion to discover."

Based on the record, especially the testimony at the *Ginther* hearing, it would be unreasonable for us to conclude that the new witnesses referenced in defendant's letter were the alibi witnesses. At the *Ginther* hearing, defendant testified that he told defense counsel about his alibi witnesses every time that counsel came to see him. There is no indication that the alibi witnesses were ever out of town or that defendant had not been able to contact them. Defendant's mother and his girlfriend had been in contact with defendant while he was in jail. In addition, a conclusion that the "new witnesses" referenced in defendant's letter were not the alibi witnesses is consistent with the trial court's factual findings at the conclusion of the *Ginther* hearing. The trial court found that defendant had not informed defense counsel of an alibi defense until shortly before trial.

Accordingly, defendant has failed to establish that the trial court abused its discretion in denying his request for substitute counsel. *Mack*, 190 Mich App at 14. The trial court's decision

not to appoint substitute counsel based on a disagreement of which it was never apprised did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Defendant also argues that the trial court erred when it ordered that he be shackled during trial. We review a trial court's decision to restrain a defendant for an abuse of discretion. *People v Dixon*, 217 Mich App 400, 404-405; 552 NW2d 663 (1996).

The right to a fair trial includes, absent extraordinary circumstances, the right to be free from shackles in the courtroom. *People v Payne*, 285 Mich App 181, 186; 774 NW2d 714 (2009). A defendant may only be shackled on a finding, supported by record evidence, that shackling is necessary to prevent escape or injury to persons in the courtroom or to maintain order. *People v Dunn*, 446 Mich 409, 425; 521 NW2d 255 (1994). Even if a trial court abuses its discretion when it orders that a defendant be shackled, the defendant, to be entitled to relief, must show that he suffered prejudice. *People v Horn*, 279 Mich App 31, 36; 755 NW2d 212 (2008). "[A] defendant is not prejudiced if the jury was unable to see the shackles on the defendant." *Id.*

We conclude that the trial court did not abuse its discretion in ordering that defendant be shackled during trial. *Dixon*, 217 Mich App at 404-405. The trial court ordered that defendant be shackled only after it found that defendant was a flight risk after conducting an evidentiary hearing. As shown by defendant's jail records, defendant had attempted to place himself in situations where an escape could be possible, such as a hospital or a jail cell with exterior windows. Defendant's manipulation attempts, along with defendant's history of not appearing for court, his anger when learning that no one would help him post bond, and his uncooperative behavior toward officers in jail, support the trial court's finding that defendant was a flight risk. The trial court's order that defendant be shackled was not based merely on the preference of a law enforcement officer. See *People v Banks*, 249 Mich App 247, 257-258; 642 NW2d 351 (2002). Accordingly, the trial court's decision that defendant be shackled during trial did not fall outside the range of reasonable and principled outcomes. *Unger*, 278 Mich App at 217.

Regardless, defendant has not shown that he was prejudiced. There is nothing in the lower court record indicating that any juror saw or heard defendant's shackles. Because there is no evidence that any juror was aware of defendant's shackles, defendant was not prejudiced by having to wear shackles. Therefore, he would not be entitled to any relief. *Horn*, 279 Mich App at 36.

Defendant argues that the prosecutor violated *Maryland v Brady*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), when she failed to disclose that Sawyer's plea agreement included the dismissal of drug charges in an unrelated case. This claim of prosecutorial misconduct is unpreserved because it was not raised before the trial court. See *Metamora Water Serv, Inc*, 276 Mich App at 382. We review unpreserved claims of prosecutorial misconduct for plain error affecting the defendant's substantial rights. *People v Ackerman*, 257 Mich App 434, 448; 669 NW2d 818 (2003).

Pursuant to *Brady*, a defendant has a due process right to obtain evidence that is in the possession of the prosecution if the evidence is favorable to the accused and material to guilt or punishment. *People v Stanaway*, 446 Mich 643, 666; 521 NW2d 557 (1994). In claiming that

Sawyer's plea agreement included the dismissal of drug charges in an unrelated case, defendant relies on defense counsel's testimony from the *Ginther* hearing. However, defense counsel's testimony was ambiguous whether Sawyer's plea agreement included the dismissal of an unrelated drug charge. Although counsel seemed to believe that a drug charge against Sawyer in an unrelated case was dismissed, he could not recall whether the dismissal was related to Sawyer's plea agreement. Accordingly, defense counsel's testimony does not establish that Sawyer's plea agreement included the dismissal of a drug charge in an unrelated case.[7] Accordingly, there was no prosecutorial misconduct constituting plain error. *Ackerman*, 257 Mich App at 448.

Defendant next argues that the trial court erred when it ordered him to pay fees, costs, and restitution without conducting an assessment of his ability to pay. Because defendant did not object when the trial court ordered him to pay the fees, costs, and restitution, the claim of error is unpreserved, see *People v Dunbar*, 264 Mich App 240, 251; 690 NW2d 476 (2004), overruled on other grounds *People v Jackson*, 483 Mich 271; 769 NW2d 630 (2009), and we review it for plain error affecting defendant's substantial rights, *Carines*, 460 Mich at 763.

Defendant's reliance on *Dunbar*, 264 Mich App at 254-255, where this Court held that a trial court must consider a defendant's ability to pay before it orders the defendant to pay the costs of his court-appointed attorney, is misplaced. The Supreme Court overruled *Dunbar* in *Jackson*, 483 Mich 271. In *Jackson*, the Supreme Court held that a defendant does not have a constitutional right to an assessment of his ability to pay before a fee for his court-appointed attorney is imposed. *Id.* at 290. According to the Supreme Court, a defendant is entitled to an ability-to-pay assessment, but a trial court need not conduct an assessment of a defendant's ability to pay until the imposition of the fee is enforced and the defendant objects to the enforcement. *Id.* at 292-293. Because defendant relies solely on *Dunbar*, he has failed to establish plain error. *Carines*, 460 Mich at 763.

In addition, defendant requests that we remand for correction of the order to remit prisoner funds. The order to remit prisoner funds states that defendant owes a balance of $3,887, not including restitution. However, at sentencing, the trial court ordered defendant to pay a total of $3,487 in costs and fees and $1,000 in restitution. Because the order to remit prisoner funds states that defendant owes $400 more than what the trial court ordered him to pay, we remand for correction of the order to remit prisoner funds.

Finally, defendant argues that defense counsel was ineffective. Because no *Ginther* hearing has been held on the four claims of ineffective assistance of counsel raised in defendant's pro per brief, our review of the claims is limited to errors apparent on the record. *Horn*, 279 Mich App at 38.

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[7] In addition, even if the dismissal of a drug charge was part of Sawyer's plea agreement, because defense counsel's testimony indicates that counsel knew of the dismissal, the testimony does not establish that the prosecutor suppressed evidence of the dismissal. See *People v Lester*, 232 Mich App 262, 282; 591 NW2d 267 (1998).

Defendant asserts that defense counsel was ineffective for failing to ensure that he was informed of the nature of the charges brought against him in the information. The basis of the claim is that defendant was never arraigned on the information and did not waive arraignment. However, as previously established, defendant's right to an arraignment on the information was eliminated. Accordingly, defense counsel's failure to ensure that defendant was arraigned on the information did not fall below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant asserts that defense counsel was ineffective for failing to move for a mistrial when defendant brought it to his attention that some jurors might be aware that he was in shackles. However, as previously explained, nothing in the record indicates that any juror was aware of defendant's shackles. Accordingly, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6.

Defendant also claims that defense counsel was ineffective because counsel never made a "formal objection or argument" to the prosecutor's request that he be shackled during trial. However, because the trial court was aware of the circumstances under which it could order defendant to be shackled and found that one of those circumstances existed, and because defendant has not identified any objection or argument that defense counsel should have made, defendant has not shown that counsel's performance fell below objective standards of reasonableness. *Uphaus (On Remand)*, 278 Mich App at 185.

Defendant argues that defense counsel was ineffective for failing to investigate the specifics of Sawyer's plea agreement. According to defendant, had counsel investigated the plea agreement, he would have learned that the agreement included the dismissal of drug charges in an unrelated case. However, as previously explained, nothing in the record establishes that the dismissal of any drug charge was included in Sawyer's plea agreement. Accordingly, defendant has failed to establish the factual predicate of the claim. *Hoag*, 460 Mich at 6.

Defendant claims that defense counsel was ineffective for failing to object, based on his inability to pay, to the trial court's order requiring him to pay fees, costs, and restitution. However, as previously established, defendant, at sentencing, was not entitled to an assessment of his ability to pay. Accordingly, any objection by defense counsel would have been meritless. Counsel is not ineffective for failing to make a futile motion. *People v Fike*, 228 Mich App 178, 182; 577 NW2d 903 (1998).

Affirmed, but remanded for correction of the order to remit prisoner funds. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Patrick M. Meter
/s/ Pat M. Donofrio